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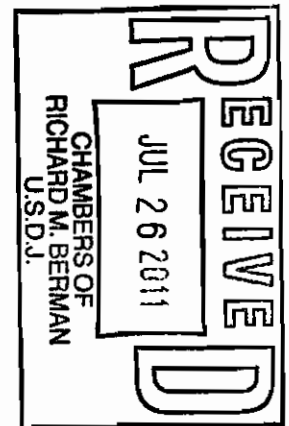
July 25, 2011

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The Honorable Richard M. Berman
United States District Court Judge
United States District Court for the Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Cahoon, et al. v. Bayerische Hypo- und Vereinsbank AG, et al.*, Case No. 11-CV-1891



Dear Judge Berman:

We represent defendants (collectively "HVB") in the above-referenced case. We submit this letter pursuant to Your Honor's individual practices requiring a letter to set forth the basis of our anticipated Motion to Strike the Declaration of Arthur L. Cahoon submitted in support of plaintiffs' Opposition to HVB's Motion to Dismiss Plaintiffs' Complaint (the "Opposition"), and to request a pre-motion conference on this motion.

HVB filed its Motion to Dismiss Plaintiffs' Complaint on June 17, 2011. Plaintiffs filed the Opposition on July 14, 2011. Plaintiffs submitted the Declaration of Arthur L. Cahoon (the "Cahoon Declaration") in support of the Opposition. The Cahoon Declaration is a ten-page document containing 34 paragraphs of facts that the declarant Arthur Cahoon ("Cahoon") contends are relevant to plaintiffs' claims and to the underlying transaction at issue. The facts in this affidavit, however, are new facts that were not asserted in the Complaint; in fact, some even contradict assertions made in the Complaint.

In adjudicating a motion to dismiss, a court's review is generally "limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007); *accord Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006). Consequently, plaintiffs' attempt to submit new facts and theories of the case through the submission of the Cahoon Declaration should be disregarded, and the Cahoon Declaration should be stricken. Indeed, courts within this district have held that "it is well-settled . . . that 'a complaint cannot be amended merely by raising new facts and theories in plaintiffs' opposition papers' . . . and a court must 'disregard any portions of [a] declaration which set forth new facts, beyond the scope of the complaint, or legal arguments, both of which are not appropriate

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for consideration on a motion to dismiss." *Volunteer Fire Ass'n of Tappan, Inc. v. County of Rockland, et al.*, 2010 U.S. Dist. LEXIS 125394 at *14-15 (S.D.N.Y. November 24, 2010); *see also Southwick Clothing LLC v. GFT (USA) Corp.*, 2004 U.S. Dist. LEXIS 25336 (S.D.N.Y. Dec. 13, 2004) ("A complaint cannot be amended merely by raising new facts and theories in plaintiffs' opposition papers, and hence such new allegations and claims should not be considered in resolving the motion.")

We thank the Court for its attention to this matter.

Respectfully submitted,

Mark P. Ressler / SED

Mark P. Ressler

cc: Brian G. Isaacson, Esq. (by e-mail)
Mark W. Wilson (by e-mail)
Edmundo O. Ramirez, Esq. (by e-mail)

